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In The

Supreme Court of the United States.

October Term, 1917.

No. 589.

THE BALL ENGINEERING COMPANY,

Petitioner,

vs.

J. G. WHITE & COMPANY, INC.,

Respondent.

Brief on behalf of Respondent, in opposition to Petitioner's Application for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

STATEMENT.

This action was brought in May, 1911, in the District Court for the District of Connecticut for damages for the unlawful seizure and conversion of certain personal property consisting of machinery, plant and materials of the value of fifteen thousand dollars ($15,000) located at or near the site of Lock and Dam No. 6 on the Trinity River, Texas.

On July 10, 1906, the Hubbard Building and Realty Company entered into a written contract with the United States

to construct Lock and Dam No. 6 on the Trinity River, Texas, and gave the usual bond to the United States. This improvement was authorized by the General Appropriation Act of March 3, 1905, and the contract so recited.

It appeared that after various changes in the ownership of the Hubbard Building and Realty Company from 1906 to 1908, one George A. Carden in August, 1908, became interested in said Company, and its President. Carden was also during this time, and from 1905 to May, 1909, in partnership with one P. D. C. Ball, doing a contracting business under the name of the Ball-Carden Company, and Ball was also in the contracting business by himself in the name of the Ball Engineering Company, and later, in April, 1910, incorporated the business under the same name, The Ball Engineering Company, and was its President, and the owner of 498 out of 500 shares of its capital stock (Findings, Nos. 3, 5, 7, 8 and 9, Record, pp. 24 to 26).

In 1908 and 1909, during the progress of the work, and while the contract was in force, the property in question was placed on the site of Lock and Dam No. 6. The partnership, Ball-Carden Company, brought it there, and it was bought with Ball's money. It was used in the actual construction of the Lock and Dam.

Work did not progress satisfactorily under the various ownerships of the Hubbard Building and Realty Company. On August 21, 1908, Carden, who with his associates had become interested in the Company, as president of the Hubbard Building and Realty Company, made an application in writing in the name of the Hubbard Building and Realty Company for an extension of time for the completion of the work. An extension of eight months was granted. About May 29, 1909, Carden made a second and similar application in writing in the name of the Hubbard Building and Realty Company and another extension was granted (Finding, No. 6, Record, p. 25).

In 1908 and 1909, the plaintiff's assignor, Mr. P. D. C. Ball, at first under the name of the partnership of Ball-Carden Company, and afterwards under the name of Ball Engineering Company, was in charge of and doing all of the actual work and furnishing material in the construction of the Lock and Dam (Findings, Nos. 5, 7, 8 and 9, Record, pp. 25 and 26).

On dates beginning January 4th, 1909, and ending September 8th, 1909, ten checks were issued by the Government in payment for all of the work performed under the contract during said period. These checks were issued monthly and covered the value of the work performed, as estimated by the Government engineer, less the retained percentage withheld by the Government according to the terms of the contract. Each of these checks bore the following endorsements: "Hubbard Building & Realty Co., by George A. Carden, President," and "Pay to the order of National Bank of Commerce," signed "P. D. C. Ball" (Finding No. 12, Record, p. 27).

Each of said checks bore on its face the following statement: "State object for which drawn," under which the following further statement appeared on each of said checks: "Constructing lock and dam No. 6, Trinity River, Texas."

The circumstances under which this Government work was performed by the plaintiff's assignor, Mr. P. D. C. Ball, were such, up to the time of his abandonment of the work, as resulted in his personally receiving all of the money paid by the Government after January 4th, 1909, when and as paid by it (Finding No. 12, Record, p. 27).

On July 24, 1909, Carden assigned to Ball all his interest in the partnership property including the property in question. Later Ball transferred it to The Ball Engineering Company, the corporation which succeeded the Ball Engineering Company, of which he was the sole owner (Findings, Nos. 3 and 7, Record, pp. 24 and 26).

On September 9, 1909, work upon the Lock and Dam was abandoned by The Ball Engineering Company. On October 22, 1909, notification of the abandonment of said contract pursuant to its provisions was given to the Hubbard Building & Realty Company by letter of that date signed by A. E. Waldron, U. S. Engineer Officer in Charge (Finding, No. 11, Record, p. 27).

On June 6, 1910, the United States Government took possession of said property, and notified the Hubbard Building & Realty Company by letter of that date of said action. The Government Engineer from this time on refused to allow the contractor or any of its agents or employees to disturb its possession of said property (Findings, Nos. 17 and 18, Record, pp. 30 and 31).

Paragraph 33 of the original specifications contained the following, to wit:

> "33. ANNULMENT. In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineer Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or acquired privileges, under purchase, at a valuation to be determined by the Engineer Officer in Charge."

On June 8, 1910, Mr. Ball by letter to Captain A. E. Waldron, U. S. Government Engineer, claimed that

> "the property in question does not belong to the Hubbard Building and Realty Company, but is the personal property of Mr. P. D. C. Ball, and Mr. Ball does not agree, nor consent to the use of any of his property, until a satisfactory arrangement has been made with the Government or the J. G. White Company as to the purchase price of the material and the rental value of the plant as may be needed by the Government, and protests against

either the J. G. White Company or the United States Government taking any manner of possession of any of the property until Mr. Ball is paid for it." (Finding, No. 16, Record, pp. 29 and 30; Defendant's Exhibit No. 2, Record, p. 96.)

To this letter the Government Engineer replied by letter dated June 9, 1910, acknowledging receipt of Mr. Ball's letter, and briefly stating in answer thereto:

> "Any attempt to remove any of the above listed items will be considered as a trespass, as the Government has actually taken physical possession of the property under the terms of the annulled contract." (Finding, No. 17, Record, pp. 30 and 31; Defendant's Exhibit No. 24, Record, pp. 103 to 107, at 107.)

On June 6, 1910, the Government entered into a written contract with the respondent to complete the unfinished work on said Lock and Dam. On that day, to wit, June 6, 1910, the United States Government leased said property to the respondent to use in completing the work, for which the respondent was to pay a monthly rental to the Government. (Findings, Nos. 15, 19 and 24, Record, pp. 29, 31 and 32.)

On July 18, 1910, the respondent receipted to the Government for the property so received by it (Finding, No. 21, Record, p. 31). On July 6, 1910, the respondent began work, and paid the United States Government a rental of Three Hundred Eighty Dollars per month, the total rental so paid amounting to the sum of about $2,000.00, and on the completion of said work returned all of said personal property to the United States. (Finding, No. 25, Record, p. 32; Plaintiff's Exhibits, "D" and "E," Record, pp. 111 to 115.)

In the final account and settlement between the contractor, the Hubbard Building & Realty Company, and the United States Government, the Government gave the Hubbard Building & Realty Company credit for the value of said personal

property and materials at the valuation determined by the Engineer Officer in Charge. After the deduction of this credit a balance was by the account shown to be due from the Hubbard Building & Realty Company to the United States. (Finding, No. 26, Record, p. 33.)

Proceedings In the Courts Below.

The Committee who heard the case and the District Court held that the respondent had unlawfully taken and converted the property in question.

On appeal the Circuit Court of Appeals for the Second Circuit, on April 13, 1915, reversed the judgment of the District Court and said:

> "We think the Committee and the Court below correctly held that the Government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company. All the same it did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as sovereign entirely competent to do this subject to the obligation of making just compensation, as required by the fifth amendment to the constitution. It made no proprietary claim, and therefore was bound to pay the real owner for the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto. The defendant in its answer jusitfied by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the Government was justified in acting as against the plaintiff under the contract with the Hubbard Company.

"We have considered this general subject in U. S. vs. Buffalo-Pitts. Co., 193 Fed. 905, 114, C. C. A. 119, confirmed 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1290. In accordance with that decision, we think that the government took title to the property in question and leased it to the defendant, who in using it was not guilty of any conversion.

"The judgment is reversed."

Vol. 223, Fed. Rep. 618.

The case went back to the U. S. District Court and to the committee, the same evidence was by stipulation submitted to the committee and no new trial was had, and the committee simply amended his conclusion of law to conform to the foregoing decision of the Circuit Court of Appeals. The District Court gave judgment for the respondent following the decision of the Appellate Court. The petitioner then brought another appeal to the Circuit Court of Appeals.

On the second appeal the Circuit Court of Appeals on April 17, 1917, affirmed the judgment below and its previous decision. After reviewing the entire record, it said:

"Having examined the record presented by this writ, we are of opinion that it differs in no material fact from that considered in 233 Fed. Rep. 618. Therefore the decision then made is binding, the issues have been adjudicated, and the judgment is confirmed, with costs."

It is from this judgment that the petitioner has brought its petition to this Court for a writ of *certiorari*. The error assigned is the failure of the Circuit Court of Appeals to hold and decide that the taking by the Government was a proprietary taking and tortious, rather than a taking as a sovereign subject to the right of compensation.

BRIEF.

I.

THIS COURT HAS REPEATEDLY HELD THAT THE POWER OF THIS COURT TO ISSUE WRITS OF CERTIORARI IS A POWER WHICH SHOULD BE SPARINGLY EXERCISED, AND ONLY IN CASES OF A CONFLICT BETWEEN TWO OR MORE COURTS OF APPEAL, OR BETWEEN COURTS OF APPEAL AND THE COURTS OF A STATE, OR CASES AFFECTING THE INTEREST OF THIS NATION IN ITS INTERNAL OR EXTERNAL RELATIONS, OR CASES OF VERY GRAVE IMPORTANCE.

Forsyth vs. Hammond, 166 U. S. 506, 514;
U. S. vs. Rimer, 220 U. S. 547;
Fields vs. U. S., 205 U. S. 292.

There is no claim here and indeed there cannot be, that there are conflicting decisions on the point in question between the Circuit Courts of Appeal of different circuits. No cases have been cited in support of any such claim, and the cases of Buffalo-Pitts. Co. vs. U. S., 193 Fed. Rep. 905; Tinker and Scott vs. U. S. Fidelity and Guaranty Co., 169 Fed. 211, and this case are all in accord.

Nor is there any conflict in the decisions of the Circuit Court of Appeals for the Second District and the decisions of this Court. In the Buffalo-Pitts. Case, reported in 234 U. S. 218, this Court was clearly in accord with the Circuit Court of Appeals of this circuit on this precise question, to wit: *Was the taking by the Government in a situation exactly similar a tortious taking?*

The Buffalo-Pitts case is identical with this case. The opinion of this Court in that case was unanimous. It is in accord with the decision of the Circuit Court of Appeals in the same case, and now in the case at hand the same Circuit Court of Appeals in a situation precisely the same has on two different appeals *unanimously* applied the law as laid down by this Court in the Buffalo-Pitts case, and held that there was no tortious taking.

In such cases this Court has many times held that there is no warrant or justification for granting a writ of *certiorari*.

Columbus Watch Co. vs. Robbins, 148 U. S. 267;
American Construction Co. vs. Jacksonville Railway, 148 U. S. 372, 383;
Forsyth vs. Hammond, 166 U. S. 506. 513, 514;
In re Woods, 143 U. S. 202;
Jones vs. Missouri Edison Electric Co., 144 Fed. 765;
Faber vs. Cunard Steamship Co., 59 Fed. 500.

II.

IT IS A WELL RECOGNIZED MAXIM IN THE LAW THAT A PARTY SHALL NOT BE PERMITTED TO TAKE DIFFERENT AND INCONSISTENT ATTITUDES WITH REFERENCE TO THE SAME TRANSACTION, OR TO INSIST, AT DIFFERENT TIMES, ON THE TRUTH OF EACH OF TWO CONFLICTING ALLEGATIONS.

We deem it essential to the proper consideration by this Court of the pending petition that the Court should take notice of the petition which the present petitioner brought to the Court of Claims on May 27, 1916, with reference to this same subject-matter.

The petition in the Court of Claims, which is filed in the name of the Ball Engineering Company, the plaintiff in this case, is sworn to by its president, P. D. C. Ball, and was brought to the attention of the Circuit Court of Appeals on the last appeal to that Court. It involves the identical property and recites the same facts as the complaint in the present suit, with one notable exception—the sixth paragraph of said petition is as follows:

> "That on or about the 30th day of June, 1910, the defendant, with full knowledge that the said personal property belonged to and was the property of the claimant, *took in its sovereign capacity title to and possession*

of the said personal property of the claimant, and used said personal property in the construction of the said public work, to wit, lock and dam No. 6, near Trinity River, Texas."

A certified copy of the petition filed in the Court of Claims is annexed hereto as Exhibit "A."

In short, the present petitioner, in a sworn petition to the U. S. Court of Claims, has been claiming since May, 1916, and now claims that the Government "took in its sovereign capacity title to and possession of the said personal property of the claimant;" in other words, that the Circuit Court of Appeals was right in its first decision, and, therefore, right in its second decision of April 17, 1917.

Under such circumstances the petitioner having elected to sue on this claim in the Court of Claims, will not now be heard to contend in direct contradiction to this position that the Government did not so take this property in its sovereign capacity, and that the decision of the Circuit Court of Appeals was wrong.

The maxim, *"allegans contrari non est audiendus,"* has often been applied by the courts to such efforts on the part of litigants.

"A man shall not be permitted to 'blow hot and cold' with reference to the same transaction, or to insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest."

Brooms Legal Maxims, p. 135;

Railroad Co. vs. McCarthy, 96 U. S. 267, 268;

Smith vs. Boston Elevated Ry. Co., 184 Fed. 389;

Great Falls Nat. Bank vs. McClure, 176 Fed. 208, 211;

Boston Elevated Ry. Co. vs. Paul Boynton Co., 211 Fed. 820;

Harman vs. Northern Securities Co., 197 U. S. 294.

III.

THE CASE AT HAND IS ON ALL FOURS WITH THE RECENT CASES IN THIS COURT OF UNITED STATES vs. BUFFALO-PITTS COMPANY, 234 U. S. 228, AND UNITED STATES vs. SOCIETE ANONYME DES ANCIENS ETABLISSEMENTS, 224 U. S. 303, AND THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE, THAT THE ACTION OF THE GOVERNMENT WAS NOT A PROPRIETARY TAKING OR TORTIOUS, IS IN ACCORDANCE WITH THE PRINCIPLES AND REASONING ADOPTED BY THIS COURT IN THESE CASES.

(*a*) In the Buffalo-Pitts case the facts were exactly parallel. The Taylor-Moore Construction Company was the contractor with the Government. The Buffalo-Pitts Company held title to an engine and appurtenances under a chattel mortgage given by the Taylor-Moore Construction Company at the time of the purchase of said engine by the latter company.

The contract was annulled on June 7, 1905. The finding is, "that the United States on that date took possession of all material, supplies and equipment belonging to said Construction Company, including the said engine and appurtenances, *pursuant to and under the provisions of said contract* with the United States." (Finding, Par. V, P. 17 of Record.) The petitioner in a letter dated August 5, 1905, was duly notified by the Government of this action, letter reading as follows:

"The contract referred to is no doubt the contract between the Secretary of the Interior and the said Company for the construction of certain work in connection with the Honda Project. Under the terms of said contract, in case of default by the contractor the United States is entitled to possession of the contractor's machinery delivered on the ground and if the engine referred to was delivered, the United States has taken possession of it under the terms of the said contract.

"The remedy of those furnishing labor or materials used by contractors in the prosecution of contracts with the United States, appears to be set forth in the Act of Congress, approved Feb. 24, 1905 (33 Stat. 811)." (Page 47 of Record.)

Again on September 26, 1905, the Government, by letter, replied to the claim of the Buffalo-Pitts Company:

> "The status of the machinery in question is the same as that of other machinery, tools, stock, etc., belonging to the contractors and taken over by the Government in pursuance of the expressed terms of the contract, and until the work is completed and matters under the contract are finally adjusted, no change in the status of the machinery can be made nor claims thereto recognized." (Pages 51-52 of Record.)

The finding in the Buffalo-Pitts case further showed that on November 13, 1905, the United States entered into a contract with another contractor to complete the unfinished work of the Taylor-Moore Company. The new contractor used the property and finished the entire work on June 21, 1906, and the personal property in question was not used after that date.

The only other testimony offered by the petitioner in that case was by a traveling salesman for the Buffalo-Pitts Company, who testified in a conversation had with the local Government Engineer on the job some time after the Government had taken possession of said property that the latter said that he "thought that their claim was a just one" and that he "thought the Government would pay for the engine." This statement the Government Engineer in his own testimony denied, and the Government Engineer further testified that he stated to the Buffalo-Pitts Company that he "was acting entirely under the terms of the contract with the Taylor-Moore Construction Company * * *;" and that "possession and use of the engine were taken under the terms of the contract with the Taylor-Moore Construction Company." (Page 63 of Record.)

The only finding from this evidence on this point was that, so far as the plaintiff was concerned, it relied upon the fact that its title to the property under the mortgage was not disputed by the Government and upon the representations made to it as testified by its representative. It was not, however, claimed in the case that the statements of the local Government Engineer in this conversation were of any binding force upon the United States, and a careful reading of the entire record shows that the foregoing was the only evidence in the case that had a bearing on, or which in any way explained the finding that the plaintiff relied upon the fact that its title to the property was not disputed by the Government, and that the plaintiff relied upon the representations made to it, and consented to the Government's retaining possession of the property in the expectation on the part of the plaintiff of receiving compensation therefor.

The transaction was the same in the case at hand. The contracts were annulled in the same way and by the same claim of authority based upon the written contracts. In both cases the petitioners asserted title to the property, and protested against the property being used until they were paid for it. The Government took the property in both cases and retained it and delivered it over to the contractor who succeeded to the prosecution of the work. After completion of the work by the last contractor the property was, in both cases, delivered back to the Government on the site of the job. In neither case was there anything to show that the Government expected to use the equipment without compensation. The Government in this case, as in the Buffalo-Pitts case, did not assert any proprietary claim to the property, but insisted always that it could deal only with the contractor, and gave credit for the property taken.

This Court, in its opinion in the Buffalo-Pitts case confirming the decision of the Circuit Court of Appeals, said on pages 232, 233, 234:

"We think the Circuit Court and the Circuit Court of Appeals were right in concluding that under the facts found the United States was liable upon an implied contract.

"In the present case, as we have said, there is nothing to show that the Government expected to use the engine and appurtenances without compensation. It did not dispute the mortgage, and the findings of fact clearly show that if the Government had the right to take the property, notwithstanding the mortgage interest which the plaintiff had in it, it made no claim of right to take and use it without compensation as against the prior outstanding mortgage, which distinctly reserved the right to take and sell the property under the circumstances shown and which after the breach of condition vested the right of possession and the right to convert the property in the mortgagee.

"It may be said, as contended, that under the contract with the Construction Company the Government had a right to take possession of this engine which was in possession of the Company as mortgagor and by virtue of the terms of the agreement complete the work, but it could not in this manner extinguish the rights of the mortgagee, nor did it undertake to do so. Under such circumstances we think the former decisions of this court, recognizing the general principles of justice which give rise to implied obligations, and enforcing the right of compensation when private property is taken for a public use, require the Government to make compensation for the use of this engine, and that the facts bring this case within *United States vs. Lynah, supra.*"

In the case at hand the defendant in its answer did set up by way of defense all of the transactions that took place between the Government and the contractor, but it also denied generally the allegation of the complaint that it "unlawfully seized upon said personal property and converted the same

to the use of the defendant." And it will also be borne in mind that the Government in this case had lawful authority to take, as a sovereign, the propety in question. It has been held in connection with similar improvements, authorized by this same Appropriation Act of March 3, 1905, and by other similar Acts that the authority of the Government to act in the premises and to take property in use or relating to these improvements is not confined to such acts, but that the Act of April 24, 1888, c. 194, 25 Stat. 94 (U. S. Comp. St. 1901, page 3525) confers upon the Government the right to take "any land, right of way, or material needed to enable it to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision has been made by law."

U. S. vs. Certain Lands in Narragansett, R. I., 145 Fed. 654, 657;
Houck vs. U. S., 201 Fed. 867.

(*b*) In United States vs. Societé Anonyme des Anciens Etablissements, 224 U. S. 309, this Court, in discussing the elements of implied contract in a similar situation, said on page 320:

> "But these elements do not have to appear by the explicit declaration of the parties. They may be collected from their conduct. The alternative of a contract is important to be kept in mind."

The Anciens Etablissements case was an appeal from a judgment of the Court of Claims in favor of the petitioner. The suit was brought for the recovery of royalties or damages claimed to be due the petitioner on his contention that the Government used a certain patented invention of the petitioner.

The principal question for determination, both in the Court of Claims and in this Court, was whether the acts of the parties as shown by the correspondence and facts set forth

in the findings were such as to constitute an implied contract, as distinguished from a tort, between the United States and the petitioner, whereby the United States became liable in damages for the alleged use of claimant's patented device. (See Record, p. 8.)

The following facts are taken from the findings in the Record:

The history of the invention of gas checks is traced from an early period to the patent of Colonel DeBange, a French officer. The patented invention came to the attention of a gun foundry board of the United States, authorized by Act of Congress, and was directly brought to the attention of the United States Minister on June 29, 1891, in a letter from Colonel DeBange, the petitioner claiming compensation for the unauthorized use by the United States Government of his invention. The claimant in the same year presented his claim in writing to the Secretary of State at Washington. The petitioner's letter was the subject of official comment between departmental officials, who passed unfavorably upon the petitioner's claim and who took the position that the gun check used by the United States Government was covered by patents which it itself owned, and that, therefore, there was no ground for the petitioner's claim. On January 31, 1894, the claimant again made formal claim to the War Department and Navy Department of the Government, stating its claim and demanding payment for the use of the invention.

On February 10, 1894, the Secretary of the Navy replied to the claimant, acknowledging receipt of the claim and stating that the gas check adopted by the United States Government resembled in certain features the claimant's patented invention, but that it also differed from it materially in certain particulars which were original in the Navy Department. The position of the Navy Department on the petitioner's claim was then stated by quoting in the letter the ruling of the Navy Department, which read as follows:

"NAVY DEPARTMENT,

"Washington, September 3, 1891.

"Sir: I have the honor to acknowledge the receipt of your communication of the 20th ultimo, enclosing copies of correspondence relating to a claim of Colonel De Bange, a retired officer of the French Army, residing in Paris, France, who alleges the use by this Government of certain inventions patented by him in guns and gun carriages.

"In reply I have to state that the Chief of the Bureau of Ordnance, in this department, to whom the communication and accompanying papers were referred, reports as follows:

" 'The bureau has not manufactured, and is not using, any gun carriages which contain principles which could be held as infringing any claims described in U. S. Patent No. 331618.

" 'The gas check which has been adopted for the naval guns of 6-inch calibre and upwards resembles in certain features that described in U. S. Patent 301220, issued to Colonel De Bange. It also differs from it materially in particulars which were original in this bureau.'

"In view of the statement made by the Chief of the Bureau of Ordnance, there appears to be no proper ground for the claim of Colonel De Bange.

"Very respectfully,

"F. J. RAMSEY,

"Acting Secretary of the Navy.

"The Honorable the SECRETARY OF THE STATE."

And the Secretary of the Navy closed his letter by reiterating the position taken by the Government three years before in the following statement:

"As the status of the case has not changed since the date of the Department's letter above mentioned, and as the matter has been previously disposed of by the Department, no further consideration of the case appears to be required."

During all of this time the invention had been used by the United States under the claim that it was the property of the United States under certain patents owned by it. On December 31, 1894, the final communication was forwarded by the War Department to the petitioner in respect to his claim. It advised the petitioner that his claim, if pursued, would probably involve other similar patents in use, and contained the suggestion that he might urge his claim to the Court of Claims.

On January 31, 1895, the Societé filed its petition in the Court of Claims.

The Government in the Anciens Etablissements Case, in its brief filed in this Court claimed the following assignment of error:

> "That the Court erred in failing and declining to hold that the facts disclosed by the correspondence between the parties hereto constituted an infringement or tortious use by the United States of the device alleged to be covered by the patent in suit; and that the Court erred in holding that it had jurisdiction of this cause, as of an implied contract in fact, arising out of the correspondence showing the relation of the parties hereto in connection with the claim in question."

The position of the Government before this Court was that there was never any meeting of the minds of the parties in the suit, and certainly not as to the recognition of any obligation by the Government, or as to any promise on the part of the authoriized officers of the Government to compensate the claimant for such use. The cases of Russell vs. U. S. 182 U. S. 516, and Harley vs. U. S., 198 U. S. 229, were claimed to be directly in point and decisive in favor of the Government. The Government claimed that the Societé made no claim for compensation except as its letter of June 19, 1891, could be considered such a claim, and this letter, if showing any claim at all, was a claim not for an authorized

or permitted use but for "an unauthorized and surreptitious use;" or, in other words, "a tortious use," out of which no implied contract in fact to pay compensation could arise. The Government further contended that no board or authorized officer made any declaration that they were of the opinion that the claimant should be compensated. It was strongly urged that the Government used what it did under a claim of right derived from the Davis Gerdom patents, for which it paid; and that it used the device before any demand or request for compensation was made, without any agreement for compensation, without any intent expressed to give compensation, and without any course of conduct from which an agreement to give compensation could be implied from the mere use.

The Government further argued that when the claim in question was presented to the Departments of this Government the officials were careful not to make any acknowledgment of the Societé's right to compensation; instead, their position as stated to the claimant was that "there appears to be no proper ground for the claim of Colonel DeBange;" that the Department had reached a decision that there was no ground for the claim in question; and that the claimant, having been notified of the Department's action, there was nothing on which to predicate an understanding that the Government would pay for the use of DeBange's invention. And finally the Government claimed that the suggestion in the letter of the Secretary as to recourse to the Court of Claims did not confer any rights upon the claimant any more than it did in the Russell case, and did not bind the Government in any implied promise to compensate the claimant for the use of the invention in question.

This Court, however, after considering the cases of Russell vs. U. S., 182 U. S. 516, and Harley vs. U. S. 198 U. S. 229, held in the Anciens Etablissements Case that an implied contract had been raised to pay for the property.

"It is not possible to review the arguments by which the claimant asserts and the Government denies the sufficiency of the facts as we have related them to constitute an implied contract between the claimant and the Government. The ultimate contention of the Government is that the mere use of the patentee's invention with his knowledge does not create an implied contract in fact to pay for such use, but 'there must be (1) a use of it with the patentee's assent, and there must *also* be (2) an *agreement* or *meeting of minds* on the part of the patentee and on the part of the user *as to compensation for the use,* even though the amount of the compensation be not fixed.' These elements, it is insisted, were present in the *Burdan Case,* which we have seen was relied on by the Court of Claims; they are, it is further insisted, absent in the case at bar.

"But these elements do not have to appear by the explicit declaration of the parties. They may be collected from their conduct. The alternative of a contract is important to be kept in mind. The officers of the Government knew of the De Bange invention and were aware of its great importance, and the purpose to deliberately take property of another without the intention that he should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them without the most convincing proof. Such proof does not exist in the present case. On the contrary, the record shows that compensation was contemplated. There was doubt as to the extent of it because there was doubt as to how far the devices used were attributable to or belonged to De Bange or whether they constituted an infringement of his patent, and therefore there was hesitancy and doubt, not as to compensation, but as to the amount and extent of it."

In short, the position of the United States in the Anciens Etablissements Case was:

"We deny that we are using your property and advise you that you have no claim; if you still think you have a valid claim against the Government the Court of Claims is open to you."

In the case at hand the Government, never asserting any proprietary right in the property, gave credit to the contractor for the property, thus showing much more clearly than in the two cases previously decided by this Court, and quoted herein, that it recognized a liability for the value of such property.

In the Anciens Etablissements Case this Court said there was doubt and hesitancy as to the extent of the liability and compensation. So, in the case at hand, as the Circuit Court of Appeals said, the Government recognized the wrong person as owner, but clearly showed its attitude or liability to whomever should prove to be the true owner, by crediting the value of the property in the Government account relating to this particular job. In the Anciens Etablissements Case, after the interchanges of communication between the claimant and the Government had ceased, and years afterwards when the claimant had pursued his claim in the Court of Claims against the opposition of the United States, it was established that the property used by the Government *was* the claimant's; *i. e.,* covered by his patents rather than by those owned by the Government. And in the case at hand it developed that the Government was at first uncertain as to its rights to deal with this property under the contract, and that at first it mistakenly interpreted its rights thereunder, but nevertheless continued to hold the property, making no proprietary claim thereto, but crediting its value to the contractor in the account kept relative to this particular improvement.

The case of U. S. vs. Lynah, 188 U. S. 445, was an action against the United States for compensation for the taking of certain real estate in South Carolina. It appeared that in improving the navigation of the Savannah River the Government had built dams which raised the water in the river, backed it up against the embankments, and prevented

the drainage of the plaintiffs' plantation. There was no specific Act of Congress authorizing the appropriation of this specific property. There was no admission of record by the Government that the land belonged to the plaintiffs, and the case was tried on the theory that the Government could not be held responsible for what it had done. In holding that the claimants were entitled to compensation from the Government for the taking, this Court said:

> "It did not repudiate the actions of its officers and agents, but on the contrary in terms admitted that they acted by authority of Congress, and that all that they did was lawfully done. So that if the overflow and destruction of this property was, as we shall presently inquire, a taking and appropriation within the scope of the Fifth Amendment to the Constitution, the jurisdictional question now presented is whether such appropriation directed by Congress created an implied contract on the part of the government to pay for the value of the property so appropriated.
>
> "The law will imply a promise to make the required compensation, where property to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the government of the United States.
>
> "The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates." (Pages 461-462, 464.)

In U. S. vs. Great Falls Manufacturing Company, 112 U. S. 645, there were no formal proceedings for condemning the land, rights and privileges, but this Court held that there

was an implied obligation on the part of the United States to make compensation to the owner:

> "The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl vs. United States,* 91 U. S. 367, 374. In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses.
>
> "In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of Congress, is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose." (Pages 656, 658.)

The attorney for the petitioner admits that the Government did have the right to take. On page 32 of his brief he says:

> "The question raised in the present case is not whether the Government was *competent* to take the property *as sovereign,* but whether *it actually did so take the property.*"

And on page 39, after attempting to distinguish between taking as sovereign and taking under contract he says:

> "This is no hardship to the Government, for it always has the right to take property as sovereign regardless of any contract."

The fact that the Government did take the property is admitted by all, and the petitioner here admits that it had full right to take it. This admission alone is sufficient ground for dismissing the petition.

IV.

IT IS HIGHLY IMPORTANT TO THE GOVERNMENT THAT ITS RIGHT TO TAKE PROPERTY AS IN THIS CASE SHOULD BE UPHELD BY THIS COURT. THE CIRCUIT COURT OF APPEALS HAS TWICE DONE THIS IN THIS CASE, FOLLOWING THE PRINCIPLES AND REASONING LAID DOWN BY THIS COURT IN THE PARALLEL CASE OF THE BUFFALO-PITTS COMPANY. WITH THE LAW SO CLEARLY LAID DOWN BY THIS COURT IN TWO CASES SO SIMILAR, THIS COURT SHOULD PROMPTLY REFUSE TO CONSIDER PLAINTIFF'S PETITION AND PUT AN END TO THIS LITIGATION, WHICH HAS LASTED NEARLY SEVEN YEARS.

If the contentions of the petitioner in this litigation prevail, then this situation is presented:

A contract existing between the United States Government and a contractor for a government improvement with provisions prohibiting the transfer of any interest in the contract, the usual formal conditions, and contractor's bond; parties working under various business names on the job, in the same business as the contractor, and at the same time interested in the contracting corporation, but not appearing of record as owners thereof; requests to the Government for extensions of time for the completion of the work made by the parties doing the work, in the name of the contracting corporation, but at the same time disclaiming liability under

the contract and bond of the contractor, or any obligation with respect to the work; the annulment of the contract by the Government; the taking by the Government of personal property on the site of the improvement, in use by the parties doing the work, and who have been paid by Government checks made payable to the contracting corporation for work under the contract, and who are interested in the contracting corporation and at the same time doing business severally and collectively under different business names; a claim of ownership of some of this property made by one of these parties in his individual name to the Government, and demand that he be paid therefor; a refusal by the Government to surrender possession of the property; a credit given by the Government in its account on this improvement to the contractor with whom alone it has dealt from first to last; completion of the work by the Government under contract with a third party, and a lease of the property by the Government to such contractor for use in completing the work. (Findings, Nos. 3 to 13, Record, pp. 24 to 29.)

In this situation the petitioner says that the Government must be deemed to have acted unlawfully and to have committed a "tortious" taking because credit for the property taken was not given or payment made by the Government to that one of these parties who established actual title to the property at the date of the taking, to wit: The Ball Engineering Company, rather than The Hubbard Building & Realty Company, or the Ball-Carden Company, or Mr. Ball known as the Ball Engineering Company. And that this fact, although there is nothing in the case to show that the Government expected to use the property *without compensation* as in the Buffalo-Pitts case, renders the latter case inapplicable and the taking a tort.

The circumstances surrounding the transaction in this case are of controlling importance. The Government was constructing a lock and dam in a remote region in Texas. Ma-

chinery and material brought there were brought for the use of the Government and were needed by the Government. The Government intended to use such machinery and material as was brought there, if suitable for its purpose, until the work was complete, no matter when or by whom it was completed. Not only is this made evident by paragraph 33 of the specifications, but such is the established practice and custom of the Government; a practice and custom that those dealing with the Government or with the contractor employed on the work must be presumed to have known.

The practice and custom has grown out of the necessities of the case and the sovereign authority of the Government. Government work must be completed and must be expedited. Its enterprises are inaugurated not for private advantage, but for the public welfare. These enterprises are conducted at far distant and inaccessible points, and the mere assembling of the plant and material is often a most difficult and tedious part of the transaction. For the Government to lose the benefit and use of plant and material when once brought to the building site would entail serious loss of time and add greatly to the cost. These well-known and fully recognized conditions make it necessary for the Government in such cases to exercise its sovereign power and take such part of the material and machinery assembled as is required for the work. In doing this, there is no proprietary claim, or claim of prior ownership on the part of the Government. The Government has no intention of depriving any one of his property without full compensation, nor is the Government primarily concerned with the ownership of the property. It makes no difference who is the owner. It needs it and must have it, whose ever it is. It expects to pay for what it gets, but it must have it and must have it at once. There is nothing else for it to do under the circumstances, so it takes what is at hand that was brought there for that use and is required. The questions of ownership and payment can be postponed, about which there can be no serious question, for

the Government is fully responsible and able and willing to pay for what it gets.

Therefore, it follows that the provisions of paragraph 33 of the specifications, so far as they relate to the taking by the Government, do not confer any new or additional power or authority upon the Government; they just state rights and powers that the Government inherently possessed without regard to them. They do not confer and, in fact, do not profess to confer any proprietary rights upon the Government. They just assert that the Government may take, a power it already had.

On the other hand, the provision of paragarph 33 in regard to the valuation of the property is merely an administrative detail, inserted to avoid trouble and exasperating disputes. So far as the property belonging to the contractor is concerned, there can be no question but that this method of arriving at a basis of settlement is valid and binding, and we believe that it is equally binding upon those who are so closely and intimately associated with the contractor as to be reasonably chargeable with knowledge of the provisions of the contract.

We also believe that the facts and circumstances as disclosed by the Record in this case, as referred to above, are of such character as to charge the petitioner with full knowledge of the provisions of paragraph 33, and that it should have been so charged and should have been held to be bound by them.

Carden as President of the Hubbard Company, must be presumed to have had knowledge of the provisions of paragraph 33. Ball, as partner of Carden in The Ball Engineering Company, engaged in the actual construction of the work must be charged with the knowledge possessed by his partner. The knowledge of Ball, as President, director, manager, financial representative and substantially sole owner of the

stock of the Ball Engineering Company, would charge that company with the knowledge possessed actually or constructively by Ball. The reading of the Record (pp. 24 to 29) must convince any impartial mind that Ball was the controlling influence in the Hubbard Company, the Ball-Carden Company and the two Ball Engineering Companies, and it is past belief, in view of the facts disclosed by the Record and particularly the fact that Ball is shown to have received all the fruits of the enterprise from the time when he took it over up to the time it was abandoned by him, that he was in ignorance of the full provisions of the contract, and hence he, and the petitioner through him, should be held to be bound by them.

We, therefore, believe the District Court and the Circuit Court of Appeals were in error in holding that the provisions of paragraph 33 were inapplicable in this case. Of course, if we are right in this, the writ of *certiorari* should be denied, for the petitioner would have no cause of action. But at no time has the respondent rested its case solely upon this contention. Its contention has always been and is, that the Government had the right to take this property and did take it, and, therefore, the possession and use of the plant and material by the respondent was lawful, and it could not be held to have wrongfully converted the property of the petitioner to its own use.

The petitioner has contended that the respondent has changed front in its defense. Such is not the case.

The petitioner in its original complaint paragraphs 5 and 6 (Record, page 9) charges:

> "5. On or about said date of June 1, 1910, the defendant, its servants, agents and employees, over the objections and protest of plaintiff and against plaintiff's express directions, unlawfully seized upon said personal property and converted the same to the use of the defendant.

"6. The said property so seized and converted to defendant's use has never been restored to the possession or use of the plaintiff."

To which the respondent made answer as follows (Record, page 18):

"5. The allegations of paragraph 5 of the complaint are denied.

"6. As to the allegations of paragraph 6, this defendant denies that it ever seized and converted any of said property referred to in the complaint or in this answer to its own use, and further alleges that previous to the commencement of this suit, this defendant as lessee as aforesaid, surrendered possession of the said property to the Government of the United States as the owner thereof, and at the time of the commencement of this suit, and for a long time before, this defendant did not have possession of said property nor any part thereof, and did not assert or claim any right, title or interest therein."

It is submitted that these grounds of defense as originally asserted are broad enough to cover the contention that the Government had lawfully asserted such ownership or control over the property as to render its use by the respondent lawful irrespective of the method by which the Government may have asserted such ownership and control.

If the Record discloses, as we respectfully submit it unquestionably does, that the circumstances under which the Government assumed control of this property were such as to show that the public welfare demanded its use in the furtherance of the public work under construction, then the Government's act in asserting its right to the property was lawful and binding upon both the petitioner and respondent, and the fact that the Government may have claimed that it had the right to pay for the property under paragraph 33 of the contract, cannot destroy, so far as this respondent is concerned, the validity of the act of the Government in taking the property openly and notoriously and assuming full con-

trol over the same, to the extent even of demanding and receiving a rental from the respondent for its use.

The Government was bound, and must be presumed, to have exercised all its power necessary to perfect its title and protect the respondent, and carry into effect its agreement and undertaking with the respondent.

Certainly the Government is in no position now to intervene and attempt to deny the rightfulness of the possession of the respondent, when it gave that possession and vouched for its authority by demanding and receiving rental for the use (Findings, 18, 19, 21, 23 and 24, Record, pp. 31 and 32). We submit that the Government is estopped as against the respondent from asserting that its (the Government's) act in taking possession of this property was tortious.

The Government received back so much of the property as was not used in construction work and receipted to the respondent for the same. For its use the Government must be assumed to have received fair compensation, for its own officers fixed the amount of rental, and the value of the material. The Government is now asking, by joining in this application for the extraordinary writ of certiorari, that the burden of its alleged tortious act should be thrown upon the respondent, who has already given to the Government full and adequate compensation for all benefits it has received. We, therefore, most earnestly insist that no consideration of public necessity or need exists in this case to influence the Court to invoke its extraordinary and discretionary power in granting this application.

The Government should be held to be estopped from asserting in this case that the decision herein, if unreversed, "will have an important and detrimental effect on the rights of the United States." (Petition, p. 18A.)

It is not a party to the suit and the decision of the dispute between the petitioner and respondent cannot directly effect its interests unless indeed, it should be using this case as a

cloak to try to build up its defense against the suit of the petitioner now pending against it in the Court of Claims, to which the attention of the Court has been heretofore called. The burden of the defense of that suit should not be thrown on the respondent.

We have already adverted to the fact that in filing that suit the petitioner has in terms accepted and adopted the conclusions of the Circuit Court of Appeals in this case, so we most respectfully and earnestly submit that neither the petitioner nor the Government, as *amicus curiae,* comes into this Court with "clean hands" and for that reason as well as on the merits, the petition should be denied.

Respectfully submitted,

LEWIS SPERRY,
HARRY W. REYNOLDS,
J. KEMP BARTLETT,
Respondent's Attorneys.

EXHIBIT A.

IN THE

UNITED STATES COURT OF CLAIMS.

No. 33,292.

BALL ENGINEERING COMPANY
A CORPORATION
COMPLAINANT

v

THE UNITED STATES
DEFENDANT.

PETITION
"(Filed, June 8, 1916.)

"Claimant respectfully shows:

"1. That it is a corporation duly incorporated on or about the 2d day of April, 1910, under the laws of the State of Missouri, and is a citizen and resident of said State, having its domicile and principal place of business in the City of St. Louis, in said State.

"2. That on or about the 30th day of June, 1910, the claimant was the owner of and entitled to the possession of certain personal property located on the site, being the land

owned and controlled by the defendant, of lock and dam No. 6, on Trinity River, Texas, which lock and dam the Hubbard Building and Realty Company had, under contract with the defendant, agreed to erect and construct.

"3. That the said personal property of the claimant was as follows:

"One anvil; 2 1-yd. bottom dump concrete buckets; 10 1½-yd. Western dump cars; 10 Koppell 1-yd. cars; 1 derrick, steel mast and boom with fittings and guy wires, but without hoisting cables; 1 derrick, cotton wood mast and boom with fittings and guy wires, but without hoisting cable, standing on north end of the wall; 1 drill press; 2 3-drum hoisting engines; 1 forge; 1 grindstone; 1 Jack screw; 1 Smith-Vaile pump, 2" discharge; 1 Smith-Vaile pump, 3" discharge; 1 pump, 1½" discharge; 13" steam pipe line 294 ft. long; 1 vise; 1 Crosscut saw; blacksmith blower and small tools; 1 cement shed; 1 blacksmith shop; 1 material house, and 1 two-story bunk house; 1 mess room; 1 kitchen and commissary; 1 office building and 3 bunk houses; 1 tramway, 20 lb. steel, 281 ft. of truck and 86 lineal ft. loose rail; 1 suspension bridge, 350 ft. span and 1 still for water; 1 set derrick fittings; 14,502 ft. round piles; 11,020 ft. sheet piling, ready to drive; 480 bolts, with washers, ¾x12; 10,480 ft. sheet piling 12x12, ready to drive; 1,100 lbs. nails; 50 cords of wood; 22 gauges for pier; 8 Capstan levers; 8 Friction roller arms; 8 journal boxes for dam; 52 cast journals, and 8 cast gate anchors.

"4. That the said personal property was, on the 30th day of June, 1910, of the fair market value of fifteen thousand dollars ($15,000.00).

"5. That on or about the 6th day of June, 1910, the defendant annulled its said contract with the Hubbard Building and Realty Company by reason of the failure of that Company to comply with its conditions.

"6. *That on or about the 30th day of June, 1910, the defendant, with full knowledge that the said personal property belonged to and was the property of the claimant, took in its sovereign capacity title to and possession of the said personal property of the claimant, and used said personal property in the construction of the said public work, to-wit, lock and dam No. 6, near Trinity River, Texas.*

"7. That the said defendant, since the said 30th day of June, 1910, has never returned the said personal property or any part thereof to the claimant, but still retains possession thereof, and has never paid claimant the value thereof, which it is in duty bound to do.

"8. That the defendant is justly indebted to the claimant for the said personal property so taken by it, as aforesaid, in the sum of fifteen thousand dollars ($15,000.00), exclusive of all set-offs and just grounds of defense, with interest thereon from the 30th day of June, 1910.

"The premises considered, the claimant demands judgment against the defendant in said sum of fifteen thousand dollars ($15,000.00), with interest from the said 30th day of June, 1910.

"BALL ENGINEERING COMPANY,
"By P. D. C. BALL,
"President.

"F. S. BRIGHT,
"Attorney for Claimant.
"LYON & SWARTZ,
"Of Counsel.

"STATE OF MISSOURI,

"CITY OF ST. LOUIS, *ss.*

"P. D. C. Ball, being first duly sworn, says that he is the President of the Ball Engineering Company and as such makes this affidavit in its behalf; that he has read the foregoing petition by him subscribed, and that the statements therein made are true to the best of his information and belief.

"P. D. C. BALL.

"Subscribed and sworn to before me this 27th day of May, 1916.

"My commission expires June 26, 1916.

"ANTHONY A. O'HALLORAN,

"Notary Public."

A true copy:

Test this September 26, 1917.

(Seal) F. C. KLEINSCHMIDT,

Assistant Clerk Court of Claims.